RECORD AND BRIEFS

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No. 17-155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Freeman* v. *United States*, 564 U.S. 522 (2011), petitioner is eligible for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines, when petitioner was sentenced after entering into a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement that required a specific sentence that is not expressly tied to the Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 849 F.3d 1008. The order of the district court (Pet. App. 16a-30a) is not published in the Federal Supplement but is available at 2015 WL 13344902.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2017. On May 22, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 27, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in

violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a, 16a-17a. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 17a. Petitioner later moved for a sentencing reduction under 18 U.S.C. 3582(c)(2), which the district court denied. Pet. App. 16a-30a. The court of appeals affirmed. *Id.* at 1a-15a.

1. A district court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Dillon* v. *United States*, 560 U.S. 817, 819 (2010). A modification may be permissible, however, "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*)." 18 U.S.C. 3582(c)(2). If a defendant meets that requirement, the district court "may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

Federal Rule of Criminal Procedure 11(c)(1)(C) provides that the defendant and the government may agree in a plea agreement on "a specific sentence" as "the appropriate disposition of the case" and that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). In *Freeman* v. *United States*, 564 U.S. 522 (2011), this Court addressed "whether defendants who enter into [Rule 11(c)(1)(C)] plea agreements that recommend a particular sentence as a condition of the guilty plea may be eligible for relief under § 3582(c)(2)" in light of that provision's requirement that the original

sentence have been "based on" the Sentencing Guidelines. *Id.* at 525 (plurality opinion).

Freeman did not produce a majority opinion. A plurality of four Justices concluded that a "district judge's decision to impose a sentence" may be "based on the Guidelines even if the defendant agrees to plead guilty under Rule 11(c)(1)(C)," because the district judge must consider the Guidelines and calculate the defendant's relevant Guidelines range when deciding whether to accept the plea agreement. 564 U.S. at 526; see *id.* at 529-534. According to the plurality, "[Section] 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." *Id.* at 530.

Concurring in the judgment, Justice Sotomayor adopted what the plurality referred to as "an intermediate position" between the plurality and the dissent. *Freeman*, 564 U.S. at 532. Justice Sotomayor concluded that a sentence imposed pursuant to a Rule 11(c)(1)(C) agreement generally will be "based on" the agreement itself, not on the district court's Guidelines calculations, because such an agreement is binding once accepted and, "[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted." *Id.* at 535-536. That is so even though "the parties to a [Rule 11(c)(1)(C)] agreement may have considered the Guidelines in the course of their negotiations." *Id.* at 537; see *id.* at 538 (rejecting argument that courts must "engage in a free-ranging search through the parties' negotiating history in search of a Guidelines sentencing range that might have been relevant to the agreement or the court's acceptance of it").

Justice Sotomayor further concluded, however, that "if a [Rule 11(c)(1)(C)] agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the United States Sentencing Commission, the term of imprisonment is 'based on' the range employed and the defendant is eligible for sentence reduction under § 3582(c)(2)." *Id.* at 534; accord *id.* at 536-540. In finding that standard met in Freeman's case, Justice Sotomayor noted that the plea agreement expressly stated that Freeman "agrees to have his sentence determined pursuant to the Sentencing Guidelines" and that the "agreement employed * * * the bottom end" of the applicable Guidelines range. *Id.* at 542 (citation omitted).

Chief Justice Roberts, writing for himself and three other Justices, dissented, concluding that a defendant who pleads guilty in exchange for a specific sentence pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2). The dissent reasoned that the sentence of a defendant who enters a Rule 11(c)(1)(C) agreement is always "based on" the agreement. *Freeman*, 564 U.S. at 544-546.

2. Petitioner was a member of a methamphetamine trafficking ring in Georgia. Presentence Investigation Report (PSR) ¶¶ 12-13. In December 2013, petitioner pleaded guilty pursuant to a Rule 11(c)(1)(C) plea agreement to one count of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A)(viii) and 846, and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 17a, 50a-70a. The plea agreement stated that petitioner faced a stat-

utory sentencing range of ten years to life on the conspiracy count and zero to ten years on the firearms count. *Id.* at 52a-53a. The plea agreement further stated that, before the court imposes a sentence, it "will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. *Id.* at 54a. The agreement stated that petitioner "understands that the Court may impose a sentence up to and including the statutory maximum * * * and that no one can predict his exact sentence at this time." *Ibid.*

The plea agreement explained, however, that the plea was "entered under the specific provisions of Rule 11(c)(1)(C)" and that "[a]s a product of negotiations between the parties and in exchange for the government dismissing" two other counts, petitioner and the government "expressly recommend that the Court should impose a sentence of 180 months of imprisonment as the appropriate custodial sentence in this case." Pet. App. 54a; see *id.* at 59a ("The parties agree that [petitioner] should be sentenced to 180 months."); see also *id.* at 55a (government also agreed not to seek a recidivist enhancement under 21 U.S.C. 851). "Under the provisions of" Rule 11(c)(1)(C), the agreement continued, "this recommendation would bind the Court to impose this particular custodial sentence if the Court accepts this plea agreement." *Id.* at 54a.

In advance of sentencing, the Probation Office prepared a PSR, which applied the 2013 Guidelines. PSR ¶ 29. The PSR stated that petitioner was responsible for 257.2 grams of methamphetamine, which resulted in a base offense level of 34. PSR ¶ 31 (citing Sentencing Guidelines § 2D1.1(c)(3)). After applying a three-level

reduction for acceptance of responsibility, the PSR calculated a total offense level of 31. PSR ¶¶ 37-38 (citing Sentencing Guidelines § 3E1.1(a)). Combining the total offense level with petitioner's criminal history category VI yielded an advisory Guidelines sentencing range of 188 to 235 months of imprisonment. PSR ¶ 56; Pet. App. 36a.[1]

At sentencing, the district court calculated the same advisory Guidelines range of 188 to 235 months of imprisonment. Pet. App. 36a. Petitioner "ask[ed] the Court to accept the binding plea," *id.* at 42a, and the government recommended the same, noting that petitioner was otherwise "facing life without parole with his prior convictions and the kind of drug quantities that were involved here," *ibid.* Consistent with the parties' request, the court accepted the plea agreement and sentenced petitioner to the agreed-upon sentence of 180 months of imprisonment. *Id.* at 44a.

In imposing sentence, the district court explained that it had reviewed the "binding" plea agreement, the PSR, the Sentencing Guidelines, and the factors set forth in 18 U.S.C. 3553(a). Pet. App. 32a-33a. The court concluded that the 180-month sentence was "reasonable"; serves the "best interest" of petitioner, the government, and society; and "complies * * * with the spirit of the * * * Sentencing Guidelines [and] with the principles of fairness and justness and specific provisions of Section 3553(a) and is a reasonable sentence without any unreasonable disparity between the sentence imposed in this case, pursuant to the binding plea

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[1] The PSR initially recommended a two-level firearms enhancement, but the district court declined to apply that enhancement. See Pet. App. 34a-35a; PSR ¶ 32 (citing Sentencing Guidelines § 2D1.1(b)(1)).

agreement, and sentences imposed upon other defendants with similar backgrounds and similar offenses." *Id.* at 33a. The court further noted that "the Government has acted very reasonably in connection with their recommendation in this case and defense counsel has acted very reasonably with his recommendation in this case as to what each lawyer believes to be a fair and reasonable sentence under the circumstances." *Id.* at 47a.

3. In 2014, the U.S. Sentencing Commission issued Amendment 782 to the Sentencing Guidelines which, when made retroactive by Amendment 788, had the effect of lowering the base offense level for a defendant like petitioner by two levels. See Pet. App. 3a-4a. On June 15, 2015, petitioner, proceeding pro se, invoked Amendment 782 and asked the district court to reduce his sentence under 18 U.S.C. 3582(c)(2). See Pet. App. 71a-76a. Petitioner did not cite *Freeman* or otherwise specifically address the implications of the agreement to a specific sentence in his Rule 11(c)(1)(C) plea agreement on his eligibility for Section 3582(c)(2) relief. See *ibid.*

The district court denied the motion. Pet. App. 16a-30a. The court reasoned that Justice Sotomayor's concurring opinion in *Freeman* was controlling, *id.* at 25a, and determined that, under Justice Sotomayor's framework, petitioner "is not entitled to relief under § 3582(c)(2) because his original sentence was not tied to the Sentencing Guidelines calculations," *id.* at 27a. The court observed that it "[wa]s abundantly clear that [petitioner's] sentence was not linked or tied to the Sentencing Guidelines. Indeed, the plea agreement does not mention an otherwise applicable Sentencing Guidelines range or [petitioner's] criminal history, and [his] criminal history category is not evident from the Agreement itself." *Id.* at 28a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals, like the district court, determined that Justice Sotomayor's opinion in *Freeman* controls the analysis. Pet. App. 5a-14a. It explained, quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977), that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Pet. App. 7a. Applying that rubric, the court found that "Justice Sotomayor's opinion in *Freeman* provides the narrowest ground of agreement because her concurring opinion establishes the least far-reaching rule." *Id.* at 8a (brackets and internal quotation marks omitted). The court reasoned that the *Freeman* plurality and Justice Sotomayor "agree on the broader principle that defendants sentenced based on a binding plea agreement can later have their sentences reduced under section 3582(c)(2), but the concurring opinion uses narrower reasoning than the plurality opinion." *Ibid.* "Whenever the concurring opinion would grant relief to a defendant sentenced according to a binding plea agreement, the plurality opinion would agree with the result because, under the logic of the plurality opinion, a defendant should always receive relief." *Ibid.*; see *id.* at 12a-13a. The court observed that its analysis was consistent with Eleventh Circuit precedent and with the holdings of eight other courts of appeals, but that two courts of appeals had reached a different conclusion. *Id.* at 8a-9a.

The court of appeals further determined, like the district court, that petitioner was ineligible for relief under Justice Sotomayor's framework. Pet. App. 14a-15a. It observed that petitioner's plea agreement did not call

for him to be sentenced within a particular Guidelines range and did not clearly indicate that the agreed-upon sentence of 180 months was tied to the Sentencing Guidelines. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-34) that this Court's review is warranted to resolve a conflict about whether Justice Sotomayor's concurring opinion in *Freeman* v. *United States*, 564 U.S. 522 (2011), is controlling and to clarify how to apply the interpretive rubric in *Marks* v. *United States*, 430 U.S. 188 (1977), to decisions that lack a majority opinion. But the court of appeals correctly decided that Justice Sotomayor's concurring opinion in *Freeman* represents the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," *id.* at 193 (citation omitted), and any disagreement on that issue is of limited significance. This Court has recently denied review in numerous cases raising the same question.[2] Further review is likewise not warranted here.[3]

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[2] See, *e.g.*, *Negrón* v. *United States*, 137 S. Ct. 2293 (2017) (No. 16-999); *Gilmore* v. *United States*, 137 S. Ct. 2264 (2017) (No. 16-7953); *Sullivan* v. *United States*, 137 S. Ct. 2263 (2017) (No. 16-7182); *Blaine* v. *United States*, 137 S. Ct. 1329 (2017) (No. 16-6574); *Fuentes* v. *United States*, 137 S. Ct. 627 (2017) (No. 16-6132); *Chapman* v. *United States*, 137 S. Ct. 625 (2017) (No. 16-5969); *McNeese* v. *United States*, 137 S. Ct. 474 (2016) (No. 16-66); *Pleasant* v. *United States*, 134 S. Ct. 824 (2013) (No. 13-6147); *Brown* v. *United States*, 565 U.S. 1148 (2012) (No. 11-6385).

[3] The petition does not seek review of the court of appeals' application to petitioner's case of the rule of decision set forth in Justice Sotomayor's concurring opinion in *Freeman*.

1. a. The general rule for ascertaining the holding of a case that lacks a majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks*, 430 U.S. at 193 (citation omitted). In some cases, there may be no "'narrowest grounds' that represents the Court's holding," *Nichols* v. *United States*, 511 U.S. 738, 745 (1994), but *Freeman* is not such a case.

In *Freeman*, Justice Sotomayor took a narrower view than the plurality of when a Rule 11(c)(1)(C) defendant is eligible for a sentence reduction. The plurality stated that a defendant is eligible for Section 3582(c)(2) relief "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement," 564 U.S. at 530, but Justice Sotomayor concluded that eligibility exists only if the plea agreement tied the recommended sentence to the Guidelines range in express terms, *id.* at 534-535.

Under the plurality's standard, the district court invariably will use the Guidelines range in question to approve the agreement or to sentence the defendant where the agreement itself "expressly use[d]," *Freeman*, 564 U.S. at 534 (Sotomayor, J., concurring in the judgment), that range to arrive at the stipulated sentence. The opinion concurring in the judgment is therefore narrower than the plurality opinion and represents the controlling standard for Section 3582(c)(2) eligibility in cases involving a Rule 11(c)(1)(C) agreement. See *id.* at 532 (plurality opinion) (noting that Justice Sotomayor's concurring opinion reflects "an intermediate position"); see also, *e.g.*, *United States* v. *Duvall*, 740

F.3d 604, 612 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (stating that the plurality in *Freeman* concluded that "sentences in cases with Rule 11(c)(1)(C) plea agreements are *always* 'based on' a Guidelines sentencing range," the dissenters "concluded that Rule 11(c)(1)(C) sentences are *never* based on a Guidelines sentencing range," and Justice Sotomayor "concluded that Rule 11(c)(1)(C) sentences are *sometimes* 'based on' a Guidelines sentencing range," and observing that "'sometimes' is a middle ground between 'always' and 'never'"); see generally *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010); *Romano* v. *Oklahoma*, 512 U.S. 1, 9 (1994); *Marks*, 430 U.S. at 193-194.

Put another way, a majority of the *Freeman* Court would agree with whatever result flowed from the application of Justice Sotomayor's concurring opinion. "[W]hen Justice Sotomayor concludes that a plea agreement was based on the Guidelines, she would agree with the result reached under [the plurality opinion]. When she concludes that a plea agreement was not based on the Guidelines, she would agree with the result reached under [the dissenting opinion]." *Duvall*, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc); see, *e.g.*, *United States* v. *Rivera-Martínez*, 665 F.3d 344, 347-348 (1st Cir. 2011), cert. denied, 568 U.S. 860 (2012); *United States* v. *Brown*, 653 F.3d 337, 340 & n.1 (4th Cir. 2011), cert. denied, 565 U.S. 1148 (2012).

The dissent in *Freeman* acknowledged that the standard in Justice Sotomayor's opinion concurring in the judgment would be the one applied by courts going forward. 564 U.S. at 550-551 (Roberts, C.J., dissenting). And ten courts of appeals have concluded that Justice Sotomayor's opinion is controlling. See Pet. App.

5a-14a; *United States* v. *Negrón*, 837 F.3d 91, 94-95 & n.3 (1st Cir. 2016), cert. denied, 137 S. Ct. 2293 (2017); *United States* v. *Benitez*, 822 F.3d 807, 811 (5th Cir. 2016) (per curiam); *United States* v. *Garrett*, 758 F.3d 749, 757 (6th Cir. 2014); *United States* v. *Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States* v. *Browne*, 698 F.3d 1042, 1045 (8th Cir. 2012), cert. denied, 568 U.S. 1242 (2013); *United States* v. *Dixon*, 687 F.3d 356, 359-360 (7th Cir. 2012); *United States* v. *Weatherspoon*, 696 F.3d 416, 422 (3d Cir. 2012), cert. denied, 568 U.S. 1188 (2013); *United States* v. *White*, 429 Fed. Appx. 43, 47 (2d Cir. 2011); *Brown*, 653 F.3d at 340 & n.1; see also *United States* v. *Leonard*, 844 F.3d 102, 108-109 (2d Cir. 2016) (acknowledging nonbinding Second Circuit precedent ruling that Justice Sotomayor's concurring opinion in *Freeman* controls, but finding that the result in the case before the court was the same under both the plurality and concurring opinions in *Freeman*).

b. Petitioner's reliance on decisions of the D.C. and Ninth Circuits adopting the approach taken in the *Freeman* plurality opinion is misplaced. See Pet. 17-18, 31-34 (citing *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), and *United States* v. *Epps*, 707 F.3d 337 (D.C. Cir. 2013)). Those courts concluded that they were free to adopt that approach on the ground that "there is no controlling opinion in *Freeman*" because no rationale was common to a majority of the Justices. *Epps*, 707 F.3d at 350; see *Davis*, 825 F.3d at 1016. In a few scenarios, the courts asserted, a defendant would prevail under Justice Sotomayor's approach but not under the plurality's, and thus the plurality's opinion is in some respects the narrower one. See *Davis*, 825 F.3d at 1016, 1023-1024; *Epps*, 707 F.3d at 350-352.

That conclusion is incorrect. "[I]n splintered cases, there are multiple opinions precisely *because* the Justices did not agree on a common rationale." *Duvall*, 740 F.3d at 613 (Kavanaugh, J., concurring in the denial of rehearing en banc). And no scenario exists under which a defendant could prevail under Justice Sotomayor's approach but the plurality would disagree. For instance, if a sentencing court considers and rejects a stipulated Guidelines range in a plea agreement on policy grounds but nevertheless imposes the agreed sentence—one of the scenarios on which *Epps* and *Davis* relied, see *Epps*, 707 F.3d at 350 n.8; see also *Davis*, 825 F.3d at 1023-1024—then Section 3582(c)(2) relief would be available under both the plurality opinion in *Freeman* and under Justice Sotomayor's concurring opinion, because the plea agreement expressly contemplated a Guidelines range and the judge expressly used the Guidelines range as the starting point for determining what sentence to impose. See *Freeman*, 564 U.S. at 529 (plurality opinion) ("Even where the judge varies from the recommended range, * * * if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence."); *id.* at 539 (Sotomayor, J., concurring in the judgment); see also *Davis*, 825 F.3d at 1037-1038 (Bea, J., dissenting); *Duvall*, 740 F.3d at 614-615 (Kavanaugh, J., concurring in the denial of rehearing en banc). For similar reasons, petitioner errs in suggesting (Pet. 32-33) that the *Freeman* plurality would not allow for a sentence reduction in a hypothetical scenario in which the parties' agreement references an incorrect guidelines range, the district court calculates the correct one, but deviates from it to accept the plea agreement.

c. In any event, disagreement in the courts of appeals about the application of *Freeman* is of limited significance and does not warrant this Court's review. Which of the *Freeman* opinions controls is "likely to be a relatively short-lived issue for the courts," because plea agreements can—as Justice Sotomayor's *Freeman* opinion suggested—be drafted to avoid any controversies about whether the sentence set forth in such an agreement is "based upon" the Guidelines. *United States* v. *Duvall*, 705 F.3d 479, 484 & n.2 (D.C. Cir. 2013); see *id.* at 484 n.2 ("At oral argument, the Assistant U.S. Attorney indicated that the U.S. Attorney's Office now drafts Rule 11(c)(1)(C) plea agreements with an eye to avoiding later litigation on the *Freeman* issue. Doing so is consistent with Justice Sotomayor's suggestion.") (citing *Freeman*, 564 U.S. at 541-542 (Sotomayor, J., concurring in the judgment)).

Petitioner's suggestion (Pet. 25-26) that plea agreements cannot be drafted to avoid such controversies is mistaken. Prosecutors and defense lawyers entering into plea negotiations can fairly be presumed to know the governing legal rule in their circuit. As such, the parties can contract around any potential *Freeman* issues by, for example, entering into a Rule 11(c)(1)(A) or (B) agreement; making clear in the plea agreement that the agreed-upon sentence is (or is not) "based on" a Guidelines calculation; or agreeing that the defendant will, as a condition of pleading guilty, waive the right to seek Section 3582(c)(2) relief. See *Freeman*, 564 U.S. at 541 (Sotomayor, J., concurring in the judgment). Although the parties did not utilize any of those measures in the plea agreement here, their availability illustrates

that any choice between the two approaches lacks sufficient prospective significance to warrant this Court's intervention.

Indeed, even where the plea agreement in question predates such drafting improvements or, for whatever reason, does not employ them, the difference between the approach taken by the plurality and the approach taken by Justice Sotomayor matters in only a small subset of cases: those in which the district court accepts a Rule 11(c)(1) plea agreement that contains a binding sentence, the agreement fails to mention the Guidelines as a basis for the sentence but the district court relies on the Guidelines as part of its analytical framework, the Sentencing Commission subsequently lowers the relevant sentencing range retroactively while the defendant is still serving the sentence, a motion for Section 3582(c) relief is made, the Commission's binding policy statements do not bar the defendant from obtaining that relief, see Sentencing Guidelines § 1B1.10(b), and the district court would exercise its discretion to permit relief (while taking into account applicable factors set forth in 18 U.S.C. 3553(a) and the advantages already gained by the defendant in connection with the plea agreement, such as dismissal of other charges, see, *e.g.*, *Dillon* v. *United States*, 560 U.S. 817, 825-828 (2010)).

Petitioner suggests (Pet. 30-31) that this case falls into that subset of cases. But even if that were correct, see pp. 17-19, *infra*, it would say very little about the number of cases that the disagreement between the plurality and Justice Sotomayor's decision would affect. Far more informative is petitioner's agreement (Pet. 27) that most other cases that have presented this issue

have done so in a posture in which its resolution was unlikely to matter.

2. Petitioner also suggests (*e.g.*, Pet. 11-16, 19-21) that this case would also present an opportunity for this Court to consider more abstractly how the *Marks* analysis should be conducted. When the Court has chosen to review a dispute about the application of *Marks* to a fractured decision, however, it has simply revisited the underlying question addressed in that decision rather than "pursu[ing] the *Marks* inquiry to the utmost logical possibility." *Nichols*, 511 U.S. at 746; see *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003). Although the petition lists the question presented in *Freeman* as a subsidiary question presented here, Pet. ii, it includes no meaningful argument for why it would independently warrant this Court's review. And direct consideration of that issue could moot (and would complicate) consideration of the *Marks* issue on which petitioner is focused.

In any event, to the extent further clarification of *Marks* might be necessary in some case, this would be an unsuitable vehicle for providing it. Whatever difficulties *Marks* may present in other cases, the application of *Marks* to *Freeman* is straightforward. See, *e.g.*, Pet. App. 13a (noting that, "applying the rule of *Marks* * * * to *Freeman*, it is clear that Justice Sotomayor's opinion controls"); *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Applying the *Marks* rule to *Freeman* is fairly easy."); *Dixon*, 687 F.3d at 359 (*Marks* is "easy to apply" to *Freeman*). It is a 4-1-4 decision in which the single Justice concurrence occupies "an intermediate position." *Freeman*, 564 U.S. at 532 (plurality opinion). As previously explained, a defendant who is eligible for a Section

3582(c)(2) reduction under Justice Sotomayor's approach would also be eligible under the plurality's approach.[4] The two circuits that have adopted the plurality approach have done so largely based on an erroneous understanding of the plurality and Justice Sotomayor's opinion. See pp. 12-13, *supra*. Consideration of the *Marks* issue here would thus provide little guidance for the application of *Marks* in other potentially more complicated scenarios.

3. Finally, review is unwarranted for the additional reason that it is unlikely that petitioner would have received a sentencing reduction even if he were eligible for one. See, *e.g.*, *Dillon*, 560 U.S. at 827 (stating if a prisoner is eligible for a sentence reduction under Section 3582(c) the district court must "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized * * * is warranted in whole or in part under the particular circumstances of the case"). Here, the effect of Amendments 782 and 788 would be to reduce petitioner's offense level by two, which in turn would reduce his Guidelines sentencing range to 151 to 188 months of imprisonment. The agreed-upon 180-month sentence that petitioner received is within that reduced range and any reduction below 180 months would not be justified in this case.

Petitioner's criminal activities were extremely serious. He was involved in a significant methamphetamine trafficking ring in Georgia. See PSR ¶¶ 12-27. Following a controlled buy with a confidential informant,

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[4] Conversely, any defendant ineligible for a Section 3582(c)(2) reduction under Justice Sotomayor's approach would also be ineligible under the dissent's approach, which would preclude such relief in all cases involving Rule 11(c)(1)(C) plea agreements. See *Freeman*, 544 U.S. at 544-546 (Roberts, C.J., dissenting).

he was personally found in possession of $14,124 in cash, 257.2 grams of methamphetamine, and a loaded firearm with an obliterated serial number. See PSR ¶ 13. Had the parties not entered into the plea agreement, petitioner would have been subject to two additional serious charges—namely, possession with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. 841(a) and (b)(1)(B)(viii); and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). See Indictment 1-3. In light of petitioner's extensive criminal history, see PSR ¶¶ 41-62, he also would have faced a mandatory sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A) (mandating life imprisonment for "any person [who] commits a violation of this subparagraph * * * after two or more prior convictions for a felony drug offense have become final); Pet. App. 55a (in exchange for guilty plea and recommended 180-month sentence, government dismissed remaining counts and promised not to pursue a recidivist enhancement under 21 U.S.C. 851); see also Pet. App. 42a (government stating at sentencing that, but for the plea agreement, petitioner "was facing life without parole with his prior convictions and the kind of drug quantities that were involved here").

Because petitioner realized considerable benefits from the plea agreement, and because the district court already found when imposing his original stipulated sentence that it was fair and reasonable, see, *e.g.*, Pet. App. 47a ("The court is convinced it has imposed a reasonable sentence."), a remand for consideration of a modification to the sentence pursuant to Section 3582(c) would be unlikely to change the outcome of petitioner's case. See *Freeman*, 564 U.S. at 532 (plurality opinion)

("If the district court, based on its experience and informed judgment, concludes the [plea] agreement led to a more lenient sentence than would otherwise have been imposed, it can deny the motion * * * [to] ensure[] that § 3582(c)(2) does not produce a windfall.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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